STATE OF MICHIGAN

IN THE SUPREME COURT

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, and **JAMES B. LINDEBAUM,**

Plaintiffs-Appellees,

v

JOYCE SCHMITT and **DIANE RANKIN,**

Defendants-Appellants,

and

RONALD SCHMITT,

Defendant.

Supreme Court
No. 130574

Court of Appeals
No. 258021

Bay County Circuit Court
No. 01-3467-CZ-C

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APPELLANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendants–Appellants Schmitt and Rankin shall continue to rely upon the discussion of the facts set forth in their application and their response to Plaintiffs' application. Additional pertinent facts, and necessary responses to Plaintiffs' discussion of the facts, will be discussed in the body of the Legal Argument, *infra*, to the extent that such discussion may be required to fully inform the Court as to the issues presented.

LEGAL ARGUMENT

I. IT WAS INAPPROPRIATE FOR THE TRIAL COURT TO MAKE AN ADDITIONAL AWARD OF ATTORNEY FEES AS CASE EVALUATION SANCTIONS IN THIS CASE, WHERE EVIDENCE SUPPORTING PLAINTIFFS' CLAIM FOR ATTORNEY FEES AS AN ELEMENT OF DAMAGES HAD BEEN PRESENTED TO THE JURY AT TRIAL, THE JURY HAD RENDERED ITS AWARD OF ATTORNEY FEES BASED UPON THE EVIDENCE AND PROPER INSTRUCTIONS, AND THE TRIAL COURT HAD DENIED PLAINTIFFS' MOTION FOR ADDITUR RELATING TO THE CLAIMED INSUFFICIENCY OF THE ATTORNEY FEES AWARDED BY THE JURY.

Plaintiffs have maintained that the constitutional right to jury trial does not apply to the trial court's assessment of case evaluation sanctions in this case because this is an issue separate from awarding of damages. This argument lacks merit for several reasons. First, as a very practical matter, it makes no difference to the Defendants whether the attorney fees in question are characterized as a "penalty" instead of damages. The award was money to be collected, regardless of the name attached. Second, as Defendants have noted previously, this Court's decisions in *McAuley v General Motors Corporation*, 457 Mich 513; 578 NW2d 282 (1998) and *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999) do not address this constitutional issue at all, and thus, Plaintiffs' continuing reliance upon those decisions is misplaced. Those decisions merely stand for the proposition that awards under multiple

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provisions are permissible as long as there is no duplication resulting in payment of more than 100% of the plaintiff's attorney fees. The excerpt from the Court of Appeals' decision in *Haliw v City of Sterling Heights*, 257 Mich App 689; 669 NW2d 563 (2003) quoted on page 22 of Plaintiffs' response does nothing more than restate that principle.

Third, Plaintiffs' reliance upon this Court's decision in *Phillips v Mirac*, 470 Mich 415; 685 NW2d 174 (2004) is also misplaced because the trial court's supplemental award of attorney fees as case evaluation sanctions does not equate with any of scenarios discussed therein. This is not a situation where the court is merely applying a statutorily prescribed cap on damages, as in *Phillips* and *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW 2d 721 (2002). It has long been recognized that the Legislature may create, modify, or abolish civil causes of action, and that the power to abolish a cause of action in its entirety necessarily implies the authority to limit the amount that can be recovered. As this Court and the Court of Appeals have noted in these cases, application of a damage cap does not take away the jury's responsibility for determining the plaintiff's damages; that amount is determined by the jury, but the amount of the award that the plaintiff can actually receive is limited in accordance with the limitation of awardable damages that the Legislature has seen fit to prescribe for the particular cause of action.

Here, the award of attorney fees has not been reduced; it has been increased. But this is not a situation where the court has applied a statutorily mandated augmentation of damages. Nor does this case involve a judicially determined imposition of a statutorily authorized civil penalty for the conduct complained of in the underlying litigation, as in *Tull v United States*, 481 US 412; 107 SCt 1831; 95 LEd2d 365 (1987). Again, the Legislature can define causes of action and their remedies. It can also prescribe penalties, and thus, it comes as no surprise that

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the Legislature has provided for an award of double or treble damages in certain cases. These statutes reflect legislative policy choices favoring punishment or deterrence of particular behaviors in addition to providing compensation for the misconduct committed against the plaintiff in a particular case. These are substantive choices which are suitable subjects for legislative policy making, but are not appropriate subjects for judicial rulemaking, which must be limited to matters of procedure.

This case involves a judicial imposition of a penalty of a procedural nature. Defendants have not disputed that the threat of case evaluation sanctions under MCR 2.403 is an appropriate incentive for settlement, although it also cannot be denied that this threat burdens the free exercise of a litigant's right to trial. A different issue is presented, however, where an award of case evaluation sanctions negates the fact-finding function of the jury by imposing an obligation to pay the same attorney fees that the jury was specifically asked, but declined, to award as damages. That issue was not addressed in *Phillips* or any of the cases discussed therein. But here, the very same attorney fees which were denied by the jury when sought as an element of Plaintiffs' alleged damages **at Plaintiffs' insistence** have been awarded as case evaluation sanctions, based, in large part, upon the attorney fees that the jury **did** award. Plaintiffs' request for this supplemental award of attorney fees that the jury did not see fit to award came **after** the trial court had declined to grant additur when asked to do so in the appropriate manner – a decision which Plaintiffs did not chose to appeal.

No matter how this may be rationalized, and without regard to what it might be called, the practical effect of the trial court's decision in this case has been to award damages that the jury declined to award. This renders the jury's determination of Plaintiffs' damages meaningless, and in doing so, improperly abridges the Defendants' constitutional right to jury

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trial. As noted previously, it has become well settled in Michigan that the constitutional right to jury trial includes the right to have the jury assess damages. *See: Zaiter v Riverfront Complex, Ltd.*, 463 Mich 544; 620 NW 2d 646 (2001); *Wood v DAIIE*, 413 Mich 573, 582-584; 321 NW 2d 653 (1982); *Leary v Fisher*, 248 Mich 574, 578; 227 NW 767 (1929). Thus, the jury's assessment of Plaintiffs' damages in this matter, including their request for attorney fees as an element of those damages, was a matter involving the "substance of a common-law right to a trial by jury" or a "fundamental element of a jury trial." *Phillips, supra,*, 470 Mich at 431.

As Defendants have noted previously, this Court has often recognized that rights guaranteed by our Constitution, including the right to jury trial, cannot be denied or impaired by legislative enactments or court rules. Thus, although this Court's authority to authorize assessment of sanctions as a penalty for rejection of case evaluation is not disputed, that authority must yield to a litigant's constitutionally guaranteed right to jury trial in cases such as this, where the assessment of sanctions conflicts with that right.[1]

[1] On page 25 of their response, Plaintiffs have said that "under Defendants' logic, this case would have to be returned for a new trial so that the jury could hear about case evaluation and then make an award which also considers the facts and circumstances related to a suggested settlement." This puzzling argument is unavailing for a number of reasons. First, Defendants have never suggested that there should be a new trial of this matter, and Plaintiffs' opportunity to request one has passed. As noted previously, the underlying judgment was not appealed, and it cannot be appealed now. The only orders appealed from here are the trial court's post-judgment orders awarding case evaluation sanctions to the Plaintiffs and denying them to Defendant Schmitt. Second, the imposition of case evaluation sanctions is a matter for the court, not the jury, and Defendants have never suggested otherwise. Thus, issues concerning the case evaluation award and the potential for sanctions are not appropriate matters for the jury to consider. Indeed, it is highly unlikely that evidence relating to these issues could be deemed admissible in light of the restrictions imposed under MRE 408. The issue here is whether a trial court's authority to award case evaluation sanctions is constrained by constitutional limitations in a case such as this, where the requested attorney fees have already been requested of, and denied by, the jury.

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II. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT PLAINTIFFS JAMES AND KIM LINDEBAUM WERE ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE, WHERE THE ADJUSTED VERDICT WAS LESS THAN THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)(4).

On page 26 of their response, Plaintiffs have said that the "central distinction" between the positions of the parties is "whether the trial court had the authority to take into consideration the injunction when setting the amount of case evaluation sanctions and whether it was "fair under all the circumstances." Defendants disagree. Although these are also important issues, the more "central" issue is whether the Plaintiffs had any right to case evaluation sanctions at all where the adjusted verdict was less than the lump-sum award that they elected.

On page 27, Plaintiffs have claimed that "it was the Defendants that requested that the evaluation be assessed against each particular defendant separately." This is not the case. As Defendants have noted before, defendants are not permitted the option of choosing a lump-sum award against all defendants. MCR 2.403(K)(2) requires that the evaluation "must include a separate award as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." The breakdown of the lump-sum award into separate awards against Defendants Schmitt and Rankin was evidently made in accordance with this requirement. That breakdown was necessary to allow for the subsequent determination of whether the verdict was, or was not, more favorable to each of them than the case evaluation. It is reasonable to assume that the requirement of separate awards against individual defendants was included in subrule (K)(2) for that reason.

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A breakdown of the lump sum award is also required in order to allow individual defendants an opportunity to avoid liability for sanctions by expressing a willingness to accept a case evaluation award. It would be fundamentally unfair to require each individual defendant to accept the total lump sum award elected by the plaintiffs under subrule (H)(4) in cases such as this, where the liability of the defendants is not joint and several. Thus, Defendant Ronald Schmitt's acceptance of the case evaluators' finding of no cause of action against him is of no consequence in determining the issues presented here.

Plaintiffs have claimed that they were only required to accept the award against each individual defendant *in toto.* This, however, is not what MCR 2.403(H)(4) says. As noted previously, MCR 2.403(H)(4) affords multiple plaintiffs an opportunity to treat the action as one involving a single claim in cases such as this, where the case involves claims of multiple injuries to members of a single family, and where this treatment is elected, the case evaluators must render a single lump-sum award to be accepted or rejected. Under the clear terms of the rule, separate awards which may be individually accepted or rejected are made only when the plaintiffs have not elected a single lump sum award and separate fees are paid for each plaintiff. Clearly, acceptance of an award made against an individual defendant under subrule (K)(2), does not constitute acceptance of the "one lump sum award." The rule does not say that this may be done, and Plaintiffs' assumption that this would be permissible is inconsistent with the clear language of the rule.

On Page 27, Plaintiffs claim that "If the evaluation was not separated, then the total verdict would be aggregated for comparison, however, this is not the situation at bar." They cite *J.C. Building Corporation II v Parkhust Homes, Inc.*, 217 Mich App 421; 552 NW2d 466 (1996) as support for this proposition. Their reliance upon that case is misplaced for two

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reasons. First, that case involved offer of judgment sanctions under MCR 2.405 instead of case evaluation sanctions under MCR 2.403. Second, the Defendants in that case chose to make their offer of judgment jointly. Here, the Defendants did not have the option of being treated jointly, the court rule required separate awards against each of them, for the reasons previously discussed. And in any event, the issue presented here does not turn on whether the awards against the Defendants were made separately or jointly; the issue is whether the second sentence of MCR 2.402(O)(1) contemplates acceptance of one or more separate awards made against individual defendants under subrule (K)(2) when the Plaintiffs have rejected a total lump-sum award that they elected to receive under subrule (H)(4), and the total adjusted verdict is less than that award. Here, the "single" Plaintiff has not done better than the lump-sum award that it rejected, and thus, is not entitled to case evaluation sanctions.

III. THE TRIAL COURT IMPROPERLY CONSIDERED ITS POST-TRIAL AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE.

Plaintiffs have applauded the Court of Appeals' conclusion that "MCR 2.403(O)(5) certainly does not prohibit the trial court from placing a value on equitable relief granted and using it in comparing the verdict and the case evaluation in the situation presented in this case. To do so furthers the apparent intent of the rule." The logic of this conclusion is flawed for two reasons. First, as Defendants have noted before, this argument is not supported by, and indeed, is contrary to, the plain language of the rule. To point this out is not a mere technicality, as the Plaintiffs and the Court of Appeals appear to assume. This Court has repeatedly held that statutes and rules must be applied as written. Second, to permit an award of attorney fees based upon an award of injunctive relief in the circumstances presented here because the court rule language at issue does not *prohibit* such an award flies in the face of

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numerous reported precedents which have consistently held that an award of attorney fees cannot be made without specific authority provided by statute or court rule. That authority must be specifically conferred; it cannot be gleaned from what a statute or court rule does not say. *See: Haliw* v *City of Sterling Heights*, 471 Mich 700, 706-707; 691 NW 2d 753 (2005) This, of course, is consistent with the well established principles that statutes in derogation of the common law must be strictly construed, and thus, common law principles may not be abolished by implication in the guise of statutory construction. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652-653; 513 NW2d 799 (1994) The same should apply to interpretation of this Court's rules of procedure.

On page 30, Plaintiffs have said that "MCR 2.403(O)(2)(c) defines "verdict" as rulings on motions after case evaluation and jury verdicts." That is not what the rule says. That subrule includes, within the definition of "verdict," a "judgment entered as a result of a ruling on a motion after rejection of the case evaluation." It says nothing of motions after jury verdicts. Plaintiffs also say that "The injunction is part of the jury verdict..." There is no basis for this. Obviously, the trial court's subsequent order for injunctive relief was not a part of the jury verdict, nor could it have been, as injunctive relief can only be ordered by the court.

Plaintiffs' reliance upon *Linden Investment Co. v Minca*, (Unpublished, Court of Appeals Docket No. 202059, 10-5-99) is misplaced because that case did not address the issue presented here at all. In that case, subrule (O)(5) was properly applied, in accordance with its clear language, to support the court's conclusion that the "verdict," which included no award of money damages, was not more favorable to the defendant in light of the equitable relief awarded to the plaintiffs. The plaintiffs had accepted the case evaluation award, and thus,

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there was no need to determine whether the verdict was more favorable to them under the second sentence of subrule (O)(1).

The unpublished decision of the Court of Appeals in *C.A. Muer Corp. v Zimmer*, (Unpublished, Court of Appeals Docket No. 187134, 7-15-97) is also unhelpful. In that case, the Plaintiff was found to be entitled to mediation sanctions because the adjusted verdict was more favorable than the mediation award. Thus, it was not necessary to rely upon the injunctive relief as a basis for the award of mediation sanctions. The additional injunctive relief awarded to the plaintiff was discussed only in relation to the defendant's claim that the fees incurred in seeking that relief were not necessitated by her rejection of the award, and thus were not properly awarded as mediation sanctions.

On page 36, Plaintiffs say that "According to Defendants' arguments, "verdict" as defined by MCR 2.403(O)(2) would never take into consideration equitable relief. There is no basis for this. Clearly, a trial court's judgment after a bench trial can order both money damages and injunctive relief. Where the plaintiff seeks money damages and injunctive relief and one or more of the parties has preserved the right to trial by jury, the claim for money damages can be decided by the jury while the claim for injunctive relief is adjudicated by the court, and both forms of relief can be included in the judgment.

IV. DEFENDANT JOYCE SCHMITT IS ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS AGAINST ALL OF THE PLAINTIFFS.

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For this issue, Defendants shall continue to rely upon the arguments made in their original application. Defendants do wish to note, however, that Plaintiffs have inaccurately suggested that Defendant Schmitt's right to appeal has been waived by her voluntary payment of the judgment. (Plaintiffs' response, pp. 18, fn. 14, and 42) This argument (and all of

Plaintiffs' discussion concerning the alleged voluntary payment and waiver) was improperly included in Plaintiffs' response because these issues are not responsive to any of the issues raised in Defendants' application. More importantly, the suggestion that Defendant Schmitt has voluntarily paid the judgment at issue (the award of case evaluation sanctions) is entirely inaccurate and misleading. Defendant Schmitt voluntarily paid the underlying judgment, which was not appealed and is not challenged in these proceedings. She has made no payment of the judgment at issue here. As Defendants have noted previously, that judgment was satisfied by a writ of garnishment seizing life insurance proceeds owed to Defendant Rankin for the death of her husband. Joyce Schmitt did not make any payment of the case evaluation award at all, and thus, it is difficult to imagine how she could be deemed to have waived her right to appeal.

RELIEF

WHEREFORE, Defendants-Appellants Joyce Schmitt and Diane Rankin respectfully request that this Honorable Court grant their Application for Leave to Appeal or other appropriate peremptory relief.

Respectfully submitted,

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